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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES DOYLE TURNAGE,

Defendant and Appellant.

G032461

(Super. Ct. No. 03CF0124)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda L. Cartwright-Ladendorf and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

James Doyle Turnage appeals from his conviction, after a jury trial, for three counts of committing a lewd act upon a child under the age of 14 years, in violation of Penal Code section 288, subdivision (a), and for one count of committing a lewd act upon a child of 14 or 15 years, in violation of Penal Code section 288, subdivision (c)(1). (All further statutory references are to the Penal Code unless otherwise specified.)

Turnage argues the trial court erred by allowing Daniel Smith, Turnage's cellmate, to testify that Turnage asked him to murder Jesus V., the victim of the crimes set forth above. Turnage contends: (1) Smith's testimony was not relevant to show consciousness of guilt; (2) the admission of Smith's testimony revealing Turnage's custodial status deprived Turnage of his constitutional rights to the presumption of innocence and a fair trial; (3) the prejudicial impact of Smith's testimony substantially outweighed its probative value within the meaning of Evidence Code section 352; and (4) the trial court erred in failing to sua sponte instruct the jury with CALJIC No. 2.06.

The trial court did not abuse its discretion by admitting Smith's testimony. Smith's testimony was relevant to show consciousness of guilt because, as the California Supreme Court held in *People v. Hannon* (1977) 19 Cal.3d 588, 599, an attempt to suppress a witness's testimony is relevant to show consciousness of guilt. Under *People v. Valdez* (2004) 32 Cal.4th 73, 121, the admission of a jailhouse informant's testimony is a circumstance in which a jury inevitably will learn a defendant is in custody for the charged offense, and does not, in and of itself, deprive the defendant of his rights to the presumption of innocence and a fair trial. Therefore, admission of Smith's testimony did not deprive Turnage of these constitutional rights. The trial court's conclusion that the prejudicial impact of Smith's testimony did not substantially outweigh its probative value was not an abuse of discretion, and even if it was, it did not constitute prejudicial error in light of the overwhelming evidence of Turnage's guilt. Even if the trial court erred by failing to sua sponte give the jury CALJIC No. 2.06, any such error was harmless

because, absent the error, a result more favorable to Turnage was not reasonably probable. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We therefore affirm.

FACTS

We view the evidence in the light most favorable to the jury's verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

In 1995, 12-year-old Jesus lived across the street from the mobile home Turnage¹ shared with his parents and two children. Jesus was “close to [Turnage’s mother],” thought of her as a “second grandmother,” and visited her at the family’s home “every other day.” During one of these visits in 1995, Turnage and Jesus were “wrestling” in Turnage’s room when Turnage pushed Jesus onto the bed, pulled down Jesus’s pants, put his penis between Jesus’s legs and “ejaculated himself.”² Turnage told Jesus, “[d]on’t tell nobody.”

Similar incidents occurred on Easter, Memorial Day, and Thanksgiving Day in either 1995 or 1996.³ On each of these three holidays, Turnage and Jesus were in Turnage’s bedroom when Turnage pulled down Jesus’s pants, put his penis between Jesus’s legs, and “ejaculated himself.” During the summer of 1996, after attending a model car show, Turnage and Jesus went to Turnage’s room and Turnage started ejaculating in front of Jesus.⁴ Turnage asked Jesus to “[f]inish oral copulating him” and Jesus did so by putting his mouth on Turnage’s penis.

¹ According to the notice of appeal, Turnage was born in June 1951.

² During direct examination, Jesus testified he was 12 years old at the time. He testified during cross-examination he was 13 years old at the time.

³ It is unclear from Jesus’s testimony which incidents occurred in 1995 versus 1996. Judith Gance, Turnage’s sister, testified Turnage was not living in his mother’s house trailer on Thanksgiving Day or Memorial Day in either 1995 or 1996. She further testified she did not see Turnage at his mother’s house on those days in either year.

⁴ Gance testified Turnage neither lived at his mother’s house nor was seen by Gance at his mother’s house during the summer of 1996.

In 1998, Jesus was arrested for committing a lewd act on a child under the age of 14 and sentenced to serve time in the Youth Guidance Center. While there, Jesus told his counselor that Turnage and Turnage's son had separately "molest[ed] him." The counselor contacted law enforcement.

At the request of the Santa Ana Police Department in January 2001, Las Vegas Police Detective Tim Moniot interviewed Turnage, who was living in Las Vegas. Turnage voluntarily submitted to the interview and told Moniot he had moved to Las Vegas six or seven years earlier and was employed as a tour bus driver. Moniot asked Turnage if he knew Jesus. Turnage asked Moniot whether he was referring to "the young man who lived in the same trailer park as he did." After Moniot responded affirmatively, Turnage stated Jesus had been his son's friend and Turnage had seen Jesus "between two to four times a week."

Moniot informed Turnage that Jesus alleged Turnage had engaged in "inappropriate sexual conduct" with him. Turnage initially stated he "couldn't recall if anything like that had taken place," and then stated "it was in fact possible that it had." Turnage explained there was a time in his past he did not like to think about and at certain times when speaking about those issues, he would remember them. When asked whether Jesus would have made up the allegations, Turnage said, "O[h], I wouldn't think so." Moniot asked Turnage what type of things he thought Jesus said might have happened. Turnage responded, "something to the effect of, 'an oral situation.'" Turnage described the incidents as starting with wrestling in his bedroom that transitioned into fondling and then sexual contact. Turnage said he would orally copulate Jesus and then stick his penis between Jesus's legs and rub himself on Jesus until he ejaculated. When asked how many times this occurred, Turnage at first said he "couldn't remember for sure," but then ultimately stated it was "definitely more than twice, and probably more than three times."

Following Turnage's arrest, Daniel Smith shared a cell with Turnage. Turnage told Smith he was in jail for allegedly sexually assaulting someone and he felt he

had been falsely accused. At trial, Smith testified that Turnage stated, “[c]ould I [Smith] help—or get someone to help him eliminate the witness that was on this case? It would help him to the point where they wouldn’t have a case.” Smith told Turnage it would cost between \$5,000 and \$10,000, and Turnage said he could borrow the money from his sister or brother-in-law. Smith informed Turnage he would need to come up with a down payment of \$2,500 before anything could take place. Smith entered into an agreement with the district attorney’s office, exchanging his cooperation for modified probation and a sentence reduction. Thereafter, Smith worked with investigators to tape-record his subsequent in-custody conversations with Turnage.

PROCEEDINGS IN THE TRIAL COURT

Turnage was charged in an information with three counts of committing a lewd act upon a child under the age of 14 years, in violation of section 288, subdivision (a) (counts 1, 2, & 3); one count of committing a lewd act upon a child of 14 or 15 years, in violation of section 288, subdivision (c)(1) (count 4); and one count of solicitation of murder, in violation of section 653f, subdivision (b) (count 5).

Turnage filed a pretrial motion in limine seeking to exclude Smith’s testimony. After the motion was argued, the trial court held Smith’s testimony relating to the time period prior to his contact with law enforcement was admissible; Smith’s testimony thereafter, including his testimony regarding the conversations taped on behalf of the district attorney’s office, was held inadmissible. Count 5 was dismissed after the prosecutor stated there was no evidence to corroborate Smith’s initial statements. A jury found Turnage guilty of the four remaining counts. Turnage appealed.

STANDARD OF REVIEW

“A trial court’s exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that

resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

DISCUSSION

On appeal, Turnage contends the trial court erred by admitting Smith’s testimony on several grounds. Citing Evidence Code section 353, the Attorney General argues Turnage waived any challenge on appeal to the admission of this testimony because, at trial, he did not object to it.⁵ But, before trial, Turnage filed a motion in limine to exclude Smith’s testimony, and the trial court held an Evidence Code section 402 hearing before ruling on the motion. Although the reporter’s transcript shows Turnage filed a motion in limine, the clerk was unable to locate a copy of the motion when the clerk’s transcript was prepared. Thus, being unable to determine the grounds upon which the motion was based, we assume Turnage moved to exclude Smith’s testimony on the same grounds upon which he now appeals. Therefore, we proceed to review the merits of Turnage’s arguments.⁶

I.

Smith’s Testimony Was Relevant to Show Consciousness of Guilt.

Turnage argues the trial court erred by admitting Smith’s testimony because it was not relevant to show Turnage’s consciousness of guilt with regard to the charged offenses.

⁵ Evidence Code section 353 states, in relevant part: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion.”

⁶ Because we conclude a valid motion to exclude was made opposing the admission of Smith’s testimony, we do not address Turnage’s claim the failure of counsel to object to its admission at trial constitutes ineffective assistance of counsel.

Smith testified: (1) Turnage told Smith he felt he had been falsely accused; (2) Turnage asked, “[c]ould I [Smith] help—or get someone to help him eliminate the witness that was on this case? It would help him to the point where they wouldn’t have a case”; (3) the two discussed total cost and down payment terms; and (4) Turnage suggested how and where he could get the money to pay Smith.

The California Supreme Court has held, “[e]fforts to suppress testimony against himself indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. [Citation.] Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. [Citation.] However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant.”” (*People v. Hannon, supra*, 19 Cal.3d 588, 599.) Accordingly, since Smith’s testimony showed Turnage attempted to suppress Jesus’s testimony against Turnage regarding the charged crimes, Smith’s testimony was relevant to establish Turnage’s consciousness of guilt.

Turnage further contends Smith’s testimony was not relevant to show consciousness of guilt regarding the charged crimes because Smith specifically testified Turnage had expressed to Smith that “he felt that he was falsely accused.” Turnage argues his conduct of attempting to eliminate Jesus, therefore, showed a motivation to eliminate a false witness to crimes he had not committed rather than a consciousness of having committed the charged crimes.

As discussed above, an attempt to suppress a witness’s testimony is relevant to show consciousness of guilt. The jury was free to accept or reject Turnage’s statement to Smith that he felt he had been falsely accused, and to otherwise weigh Smith’s testimony. The fact more than one inference might be reasonably drawn from Smith’s testimony does not render it irrelevant or inadmissible.

II.

The Admission of Smith's Testimony Revealing Turnage's Custodial Status Did Not Deprive Turnage of His Constitutional Rights.

Turnage contends Smith's testimony revealed Turnage's custodial status and thus violated his rights to the presumption of innocence and a fair trial, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

In *People v. Valdez*, *supra*, 32 Cal.4th 73, 121, the California Supreme Court stated, "the mere fact that the jury is made aware of a defendant's custodial status does not deprive the defendant of his constitutional rights. As we pointed out in *People v. Bradford* (1997) 15 Cal.4th 1229 . . . , 'in certain circumstances a jury inevitably will learn a defendant is in custody for the current charged offense, for example where the jury is presented with the testimony of a jailhouse informant.'"

As discussed above, Smith's testimony was relevant to establish Turnage's consciousness of guilt. Smith testified Turnage solicited Smith to eliminate Jesus. It was inevitable the jury would learn Turnage was in custody for the charged offenses when presented with the testimony of Smith, a jailhouse informant. (*People v. Valdez*, *supra*, 32 Cal.4th 73, 121.) The fact the jury was made aware of Turnage's custodial status, therefore, did not deprive Turnage of his constitutional rights. (*Ibid.*)

III.

The Probative Value of Smith's Testimony Was Not Substantially Outweighed by Its Prejudicial Impact.

Turnage contends Smith's testimony was substantially more prejudicial than probative and thus was highly inflammatory. He argues the testimony should have been excluded under Evidence Code section 352 because: (1) the revelation of Turnage's custodial status permitted the jury to infer he was guilty as charged and (2) testimony showing Turnage solicited Jesus's murder permitted the jury to infer Turnage was a "bad man who was willing to have another person murdered."

“Under Evidence Code section 352, the trial court has discretion to exclude evidence ‘ . . . if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ The trial court’s exercise of discretion in admitting evidence under Evidence Code section 352 will not be disturbed unless the court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.)

“When a defendant objects to evidence pursuant to Evidence Code section 352, the record must demonstrate affirmatively that the trial court did in fact weigh prejudice against probative value. [Citations.] Nonetheless, “‘the trial judge need not *expressly* weigh prejudice against probative value—or even *expressly* state that he has done so.’”” (*People v. Crittenden* (1994) 9 Cal.4th 83, 135.) As discussed above, the record does not contain a copy of Turnage’s motion seeking to exclude Smith’s testimony. We therefore cannot confirm whether Turnage asked the court to exclude the testimony under Evidence Code section 352. The record shows that in ruling on Turnage’s motions regarding prior conviction impeachment evidence and his motion regarding Smith’s testimony, the trial court stated, “the court did do a [section] 352 weighing analysis.” As discussed above, we assume Turnage objected to Smith’s testimony based on Evidence Code section 352. Even if we were to conclude the record does not sufficiently demonstrate the trial court weighed probative value against prejudicial impact, any such error was harmless. In light of the overwhelming evidence of Turnage’s guilt regarding the charged crimes, including Jesus’s testimony and Moniot’s testimony, even if Smith’s testimony had been excluded, it was not “reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson, supra*, 46 Cal.2d 818, 836; see *People v. Alvarez* (1996) 14 Cal.4th 155, 216.)

On the other hand, if we construe the record as demonstrating the trial court engaged in the weighing process required by Evidence Code section 352, we find the trial court did not abuse its discretion by admitting Smith's testimony. As discussed above, Smith's testimony was highly probative to show Turnage's consciousness of guilt. Smith's testimony described Turnage's efforts to arrange for Smith to eliminate Jesus, the victim and key witness for the prosecution. Although Smith's testimony revealed Turnage's custodial status to the jury and also revealed Turnage was "willing to have another person murdered," the trial court did not abuse its discretion by finding the probative value of the testimony was not substantially outweighed by the prejudicial impact. Of course, as discussed above, any error in admitting Smith's testimony was harmless.

IV.

Failure to Instruct the Jury with CALJIC No. 2.06 Was Harmless Error.

Although Turnage asserts he is not "challeng[ing] the trial court's failure to sua sponte instruct the jury pursuant to CALJIC 2.06," he argues in his opening brief that he was prejudiced by this omission.⁷ Turnage contends that, without having been given this instruction, the jury "could have used the solicitation evidence by itself to conclude that appellant committed the [charged] offenses." Turnage offers no authority requiring that CALJIC No. 2.06 be given sua sponte and we have found none.

Even if the trial court erred by failing to give sua sponte that instruction, any such error was harmless because it was not reasonably probable that a result more favorable to Turnage would have been reached absent the error. (*People v. Watson*,

⁷ CALJIC No. 2.06 states, "If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing evidence] [by _____], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

supra, 46 Cal.2d 818, 836.) The jury was given CALJIC Nos. 2.90, 4.71.5, 10.41, and 10.42.5, and therefore was instructed on the elements of the charged offenses and the requirement the prosecution prove beyond a reasonable doubt all the elements of the offenses. “Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions.” (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Turnage does not contend the jury instructions as given misled the jury as to the elements of the offenses. Thus, even without CALJIC No. 2.06, the instructions stated the prosecution was required to prove beyond a reasonable doubt all the elements of the offenses.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.